

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1058 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BHAGYODAYA OIL MILL

THRO' PROPRIETOR

Versus

STATE OF GUJARAT

Appearance:

MS MEGHA JANI for Petitioner

MR VB GHARANIA, AGP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 14/11/97

ORAL JUDGEMENT

Rule. Service of rule waived by Mr. V.B. Gharania, Ld. AGP for the respondent.

2. Heard. The petitioner being the plaintiff in Regular Civil Suit No. 1128 of 1984, gave application on 6/11/1984 for permitting the petitioner to withdraw the suit with liberty to file fresh suit as the suit already

filed would suffer from a technical bar of want of notice u/S. 80(1) of the Code of Civil Procedure, 1973 (for short 'CPC'). It appears that the learned trial Judge has failed to apply his mind to the grounds so stated in the application. Section 80 of the CPC would read as under:-

'80 (1) [Save as otherwise provided in sub-section (2), no suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of -

(a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;

(b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;

(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;

(c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district;

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be,

a reasonable opportunity of showing cause in respect of the relief prayed for in the suit : Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

(3) No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error or defect in the notice referred to in sub-section (1), if in such notice-

- (a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice had been delivered or left at the office of the appropriate authority specified in sub-section (1), and
- (b) the cause of action and the relief claimed by the plaintiff had been substantially indicated.'

3. It is not in dispute that the petitioner had not served notice u/S. 80(1) of the CPC before filing the suit. That is apparent on the face of the application in question moved before the learned trial Judge. In that view of the matter, it is clear that the learned trial Judge has failed to exercise his jurisdiction.

4. On a plain reading of Order 23 (3) of the CPC it would clearly appear that where a Court is satisfied that a suit must fail by reason of some formal defect, or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, the Court may, on such terms as thought fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

In the present case, the petitioner did point out the formal defect as stated above, inviting the Court to grant liberty to file fresh suit in respect of the subject matter of the suit after compliance of provisions of section 80 of the CPC.

5. In above view of the matter, the application given by the plaintiff deserved to be granted. That having not been done the impugned order has got to be set aside and following order is required to be passed :-

Impugned order dated 28/1/1997 below Exh. 124 passed by the learned trial Judge being Civil Judge (S.D.) at Jamnagar in Regular Civil Suit No. 1128 of 1984 is hereby quashed and set aside while granting the application and permitting the petitioner being the plaintiff in the aforesaid suit, to withdraw the suit with liberty to file fresh suit on the same subject matter.

Rule made absolute in the aforesaid terms. No order as to cost.

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